In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible] 49

LOCAL 24 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, and

KENNETH BURKE,

President and Business Agent of Local 24,

Petitioners,

vs.

REVEL OLIVER and A. C. E. TRANSPORTATION COMPANY, INC. and INTERSTATE TRUCK SERVICE, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN BEHALF OF RESPONDENTS A. C. E. TRANSPORTATION CO., INC. AND INTERSTATE TRUCK SERVICE, INC.

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No. 927.

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STATEMENT OF FACTS.

This case arose on a petition filed by Respondent Revel Oliver, the owner of motor vehicles of the type ordinarily used in the transportation of freight in commerce. Respondent Oliver is one of thousands of such owners who are engaged in the business of leasing their vehicles to common and contract carriers who operate pursuant to authority granted by the Interstate Commerce Commission and the Public Utilities Commission of Ohio.

Generally, as in the case at issue, the lease requires the owner of the equipment to furnish the driver and perform the transportation service for the lessee carrier, with the result that the relationship is that of employer and independent contractor. There are many other types of arrangements in the industry. In some cases the arrangement is simply a lease of the equipment and the carrier hires his own driver and supervises the operation of the equipment. In every case the owner of the equipment is performing an independent business function, at least insofar as the lease of the equipment is concerned, which function is part and parcel of our free enterprise system.

The Supreme Court has heretofore commented on its obligation to protect this small businessman. See the following from the majority opinion in *Teamsters Union Local 309 vs. Hanke*, 339 U. S. 470, 475:

> "These two cases emphasize the nature of a problem that is presented by our duty of sitting in judgment on a State's judgment in striking the balance that has to be struck when a State decides not to keep hands off these industrial contests. Here we have a glaring instance of the interplay of competing social-economic interests and viewpoints. Unions obviously are concerned not to have union standards undermined by non-union shops. This interest penetrates into self-employer shops. On the other hand, some of our profoundest thinkers from Jefferson to Brandeis have stressed the importance to a democratic society of encouraging self-employer economic units as a counter-movement to what are deemed to be the dangers inherent in excessive concentration of economic power. 'There is a widespread belief * * * that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men; * * * and that only through participation by the many in the responsibili-

ties and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty.' Mr. Justice Brandeis, dissenting in *Liggett Co. vs. Lee*, 288 U. S. 517, 541, 580, 77 L. Ed. 929, 940, 961, 53 S. Ct. 481, 85 A. L. R. 699."

The purpose of the action is to determine whether or not the petitioning union and the respondent carriers have a right to enter into a contract, the terms of which are identical for all carriers and teamster-affiliated unions within the entire State of Ohio, fixing the terms by which persons such as the Respondent Oliver may lease equipment to common and contract carriers parties to the union agreement.

Respondent Oliver bases his claim that the unions and the carriers have no right to contract with respect to the lease of equipment upon the Valentine Act of Ohio, Revised Code, Section 1331.01, in that such contracts tend to restrict trade and to create a monopoly in the business of leasing equipment.

The petitioners have variously claimed that the jurisdiction is in the National Labor Relations Board; that if any violation exists, it is of the Federal anti-trust laws, rather than the state; and that the matter is concerned with a legitimate objective of collective bargaining contracts between employer and employee.

The Ohio Court of Appeals, as affirmed by the Supreme Court of Ohio, found the following facts to be true:

1. That at the time the petitioners and respondent carriers executed the labor agreement, of which Article XXXII was a part, Respondent Oliver and respondent carriers had in effect a lease covering the same subject matter.

2. Respondent Oliver was an independent contractor.

3. The subject matter of Article XXXII was not within the permitted or protected activities of the L. M. R. A.

4. Article XXXII is in direct conflict with Section 1331.01 of the Revised Code of Ohio, which is the state anti-trust law.

5. Respondent Oliver will be damaged in the event Article XXXII becomes effective.

6. The National Labor Relations Board has no jurisdiction to give Respondent Oliver any relief.

7. The courts of Ohio have jurisdiction.

8. The courts of Ohio have a duty to restrain the enforcement of Article XXXII.

JURISDICTION AS CONTROLLED BY FEDERAL LABOR LEGISLATION.

The Congress of the United States has not pre-empted the field of labor relations. Through the enactment of the Norris-LaGuardia Act, the National Labor Relations Act and the Labor Management Relations Act, as these Acts have been amended, the jurisdiction of the Federal courts has been delimited and the National Labor Relations Board has been created with certain enumerated broad, but limited, powers to regulate labor relations.

Since the Federal Acts have enumerated certain powers of the courts and boards, there is a great area beyond the enumerated powers which the Federal authority does not reach. The area which is not reached by the Federal regulations remains within the jurisdiction of state courts and, where they have been created, state boards. Any other view of the jurisdictional question as it affects labor relations would result in a denial of due process in those areas where the Federal board has no jurisdiction.

(*Amalgamated Meat Cutters vs. Fairlawn Meats*, 353 U. S. 20, involves a no man's land created, not by lack of jurisdiction, but by a failure to assume jurisdiction by reason of an arbitrary minimum rule set up by the National Labor Relations Board.)

The Federal legislation has also been directed toward the regulation of labor disputes and the prevention of certain activities which have been designated unfair labor practices. For the purpose of the Federal legislation, a labor dispute is much broader, for example, under the Norris-LaGuardia Act than it is under the two Acts providing for the regulation of labor relations by the National Labor Relations Board. An unfair labor practice is not such an activity as a court might feel to be unfair. It is only such acts as have been declared to be such in the L. M. R. A.

The case of *Garner vs. Teamsters Union*, 346 U. S. 485, 98 L. Ed. 228, is regarded by all persons as the leading case on the question of the conflict of jurisdiction. A close reading of the reported case, together with the subsequent cases on the subject by the same court, will clearly indicate that while this case is still a leading case on the subject and while it may have pinpointed a particular issue, it actually was based on prior decisions of the court, expressed no new law, and will probably be recognized one day as a landmark in fixing the limitations on the jurisdiction of the Federal boards and courts in labor matters, rather than a case which enlarged that jurisdiction.

The situation involved in the *Garner* case is simple. The union, in an attempt to organize the employees of the plaintiff, established a picket line to advertise to the public that such employees were not members of the union and that the employer was considered unfair by reason thereof. Few, if any, of the employees were members of the union.

The Supreme Court of the United States affirmed the Supreme Court of Pennsylvania in its decision that such activity was a violation of the National Labor Relations Act, that the jurisdiction to prevent such unlawful activity resided in the National Labor Relations Board, and that, therefore, the State courts had no jurisdiction to hear and determine the controversy. This case cannot properly be understood until it is very definitely recognized that it was based upon the fact that there was positive jurisdiction in the Board to grant a remedy. The nubbin of the decision is that since the Federal jurisdiction, where applicable, is supreme, and where a remedy is granted by the Federal courts and boards, the State cannot also grant a remedy for the same identical wrong. In expressing this statement, the court in positive language stated that where there was no conflict in remedy, the state jurisdiction remained intact. We quote the following paragraphs from the decision on the foregoing proposition:

> "The National Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area is which state action is still permissible * * * (page 488).
>
> "Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute, it has forbidden labor unions to exert certain types of coercion on employees * * * (page 488).
>
> "* * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal

board, precludes state courts from doing so. Cf. *Myers vs. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459; *Amalgamated Utility Workers vs. Consolidated Edison Co.*, 309 U. S. 261, 84 L. Ed. 738, 60 St. Ct. 561 * * * (pages 490).

"* * * *The conflict lies in remedies, not rights.* The same picketing may injure both public and private rights. *But when two separate remedies are brought to bear on the same activity, a conflict is imminent* * * * (Emphasis added) * * * (page 498).

"On the basis of the allegations, the petitioners could have presented this grievance to the National Labor Relations Board. The respondents were subject to being summoned before that body to justify their conduct. We think the grievance was not subject to litigation in the tribunals of the State" (page 501).

The decision in the *Garner* case raised such a hue and cry that the Supreme Court in several decisions thereafter explained what they had said in that case. It caused a lot of people to go back and re-examine the decision in its entirety, and we think most persons then agreed that the *Garner* case had not been the momentous decision that had originally been thought.

We cite from one of the later Supreme Court cases in which the court explained the rule which they had intended to express in the *Garner* case: *United Construction Workers vs. Laburnum Construction Corp.*, 347 U. S. 656, 98 L. Ed. 1025. In this case a suit for damages for breach of contract was filed in the Virginia State Court for alleged violation of a labor agreement. There was no question but what the employer was engaged in interstate commerce. A judgment was awarded to the employer, which judgment was affirmed on appeal by the Supreme Court of Virginia and by the United States Supreme Court. The Supreme Court's review of the case was limited solely to the ques-

tion of jurisdiction (see 347 U. S. 658). We quote the following from the court's opinion on page 663:

> "* * * In the Garner Case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation * * *."

and at page 665:

> "* * * To the extent that Congress prescribed preventive procedure against unfair labor practices, that case (the Garner case) recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the Garner Case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived."

The jurisdictional rule, as expressed by the Supreme Court, is demonstrated in the case of *NRLB vs. Swift & Co.*, decided by the United States District Court and reported at 130 F. S. 214, affirmed and modified at 233 F. 2 226. The Appellate Court held that the district court had no jurisdiction to consider an injunction of the state court in this matter. Swift & Co., an interstate employer, had filed a complaint with the National Labor Relations Board and alleged a specific violation of the NLRA. The NLRB

and its general counsel refused to issue a complaint and the matter was dismissed by the Board. The employer then sought an injunction against the allegedly illegal picketing from the State Court of Missouri. The Board then filed an action in the Federal District Court to enjoin the State court. The decision which we refer to is the denial by the District Court of the petition of the Board for this injunction. The employer in the State court not only alleged that it was engaged in interstate commerce, but alleged that the picketing violated both the Federal, as well as the State law. The court points out that the instant case is the exact opposite of the *Garner* case, and we quote from the case:

> "However, in the Garner case there was no attempt to invoke the jurisdiction of the Board. Here we have just the opposite situation. Respondent Swift has filed unfair labor practice charges with the Board, and the one concerning the picketing at the company plant has been dismissed by the regional director and the ruling approved on appeal by the General Counsel of the Board."

The court pointed out that the Supreme Court had stated that much was left to the jurisdiction of state courts and that to deny an employer resort to a remedy before any tribunal would be a denial of due process; that the General Counsel of the Board could not take the position that a litigant should be denied any remedy whatsoever (page 88,852):

> "* * * In effect, the General Counsel of the Board is contending not that there is a conflict of remedies, but that there should be no remedy whatsoever. Having in mind the language of the Garner case that the manner in which the matter is decided does not destroy the potentialities of conflict where a conflict exists, it is clear in this case that no conflict can arise

when the road to an adjudication by the Labor Board is thus blocked. To hold otherwise would deny the respondent due process of law."

The jurisdictional question was presented to the Court of Appeals in California in the case of *Colgate-Palmolive-Peet Co. vs. Warehouse Union Local 6*, 282 P. 2 1015, 28 LC 69,280. The question arose on the cross-petition by the union for damages for breach of contract. Normally, the refusal to bargain by either party would be an unfair labor practice as defined in the National Labor Relations Act. In this particular situation there was a contract between the parties which required bargaining on a certain issue. The union chose to sue for breach of this contract to bargain, rather than to file a complaint with the Board. The court held that it had jurisdiction since the union had chosen to avail itself of its remedy of an action for damages for breach of contract, even though it could have availed itself of its right to file a complaint with the National Labor Relations Board. In other words, the union had chosen to avail itself of a remedy which was not in fact in conflict with the exclusive remedy granted by the Board.

Ohio courts have recognized their rights to grant relief in cases where there is no conflict in the remedy offered by its system compared with that offered by the Federal system. See *General Electric Co. vs. UAW*, 64 O. L. A. 231.

See also *Standard Oil Co. vs. Oil, Chemical & Atomic Workers Int. Union*, 76 O. L. A. 266, wherein the court made the following observation:

"As a matter of fact, research shows that the Congressional Committee, handling the Taft-Hartley Act on this question of enforcement of contracts said this, and I quote from their Committee report:

" 'Once parties have made a collective bargaining contract the enforcement of the contract should be left to the usual processes of the law and not to the National Labor Relations Board.' " (page 275.)

Also see *Commonwealth vs. McHugh*, 326 Mass. 249, 93 N. E. 2, 751, more fully described hereafter in our brief.

NO CONFLICT OF REMEDY.

Any remedy which the Federal jurisdiction can possibly grant in this situation which would be in conflict with that granted by the courts of the State of Ohio, would be contained in the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, otherwise referred to as the Taft-Hartley Act, Title 29 U. S. C. 151-168.

We have pointed out that Respondent Oliver brings this action as the lessor of motor vehicles to common or contract carriers. As such, he is an independent contractor. This is so, even though in some other capacity he may own and operate another business, or may be employed by some employer, which employer may or may not be the lessee of his motor vehicles. The NLRA governs the relationship between employees and employers. Section 2(3) of the Act defines the word "employee" and very specifically provides that such definition shall not include "or any individual having the status of an independent contractor." *The trial court has determined that Respondent Oliver is an independent contractor and, as such, does not have the status of employee under the Act.* Therefore, there would be no jurisdiction in the National Labor Relations Board whatsoever to consider any disputes which he might have as such independent contractor with any party who should lease his equipment, or with any union which might have an interest in the

lease of such equipment. This is so since Section 7, which defines the rights of employees, and Section 8, which defines both employer and union unfair labor practices, are limited to defining and protecting the rights of "employees."

The petitioners, at page 8 of their brief, cite the case of *NLRB vs. Hearst Publications*, 322 U. S. 111, as being a declaration by this Court that, for uniformity, the Board has jurisdiction to hear the facts and make a determination as to whether an individual is an employee or an independent contractor. This is not the case for at least two reasons. First, this is an anti-trust case involving the legality of a written contract, a situation over which the National Labor Relations Board has no jurisdiction whatsoever. The courts of Ohio have jurisdiction to enforce their Anti-Trust Act and, necessarily, have jurisdiction to determine all questions involved in such an action. See page 40, *infra*, of this brief where this subject is more fully discussed. Second, the intent of Congress in passing the Taft-Hartley Act on this question was to alter the rule expressed by this Court in the *Hearst* case and to have the question of whether or not an individual is an independent contractor settled by local law. See House of Representatives Conference Report No. 510, page 5:

> "(D) The House bill excluded from the definition of 'employee' any individuals having the status of independent contractors. Although independent contractors can in no sense be considered to be employees, the Supreme Court in *N. L. R. B. vs. Hearst Publications, Inc.* (1944), 322 U. S. 111, held that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were 'employees' within the meaning of the Labor Act. Consequently it refused to consider the question of whether certain categories of persons whom the Board had deemed

to be 'employees' were not in fact and in law really independent contractors."

and at page 6:

"(D) The conference agreement follows the House bill in the matter of persons having the status of independent contractors."

and see also the following comment on Section 2(3) of the Taft-Hartley Act from the Report of the 80th Congress, first session, No. 245, page 18:

"(D) An 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board vs. Hearst Publications, Inc.* (322 U. S. 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees.' The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others

to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee.' "

Section 7 of the Act provides that employees shall have the right to organize or to refrain from such activity, and is here mentioned because it is this right which is protected by much of the language of Section 8. No rights protected by Section 7 are involved.

Section 8 is the real heart of the Act in that it defines what shall be unfair labor practices by an employer (Section 8(a)) and those which are unfair for a labor organization (Section 8(b)). There can be no jurisdiction in the National Labor Relations Board unless some claim can be made that an unfair labor practice, or a protected activity, is involved.

The provisions of Section 8(a) must be examined to determine whether or not an employer is guilty of an unfair labor practice. Without prejudice to the claim of Respondent Oliver that he is an independent contractor and not an employee covered by the Act, we should examine this section to determine whether he could make any claim to the Board with respect to the activities of the respondent carriers in signing the contract which is at issue in the pending case.

Section 8(a)(1) provides that an employer shall not interfere with an employee in the exercise of the rights guaranteed in Section 7, which, we have seen, is his right to join or not to join a labor organization. The provisions of this section are not involved in this case.

Section 8(a)(2) provides that an employer shall not interfere with the formation of a labor organization. There is no issue involved in this case concerning this section.

Section 8(a)(3) prohibits employers from encouraging or discouraging membership in any labor organization. There can be no issue raised under this section, since Respondent Oliver is a member of the petitioning union and the other parties, i.e., the petitioning union and respondent carriers, have for some years entered into labor agreements for the employees of the respondent carriers.

Section 8(a)(4) provides that an employer shall not discriminate against an employee for giving testimony for filing charges under the Act. There has been no violation of this section.

Section 8(a)(5) provides that an employer shall not refuse to bargain collectively with employee representatives. The claim in this case is not that they have refused to bargain, but that they have bargained over matters not the proper subject of a labor contract and to the extent that it is monopolistic. There has been no violation of this section.

These are all of the matters which could be claimed to be unfair practices by employers, i.e., the defendant carriers, and none are applicable. There would, therefore, be no jurisdiction in the NLRB to consider any claim made by Respondent Oliver against the respondent carriers.

Section 8(b) provides for unfair labor practices by labor organizations, i.e., the petitioning union. We shall now consider them paragraph by paragraph.

Section 8(b)(1) provides that labor organizations shall not interfere with an employee's rights as guaranteed in Section 7, which is the counter-part of Section 8(a)(1), and refers to an employee's right to join or refrain from joining a labor union. There is no issue involving a violation of this section.

Section 8(b)(2) makes it an unfair labor practice for a union to cause an employer to discriminate against an employee in violation of Section 8(a)(3), the effect of which is to prohibit a union from causing an employer to discriminate against an employee to encourage or discourage membership in a labor organization. There is no claim that the petitioning union has violated this section.

Section 8(b)(3) is the counter-part of Section 8(a)(5) and makes it an unfair labor practice for a union to refuse to bargain with an employer. There is no claim that the petitioning union has refused to bargain.

Section 8(b)(4) makes it an unfair labor practice for a union to induce or encourage employees to engage in a strike where an object is certain enumerated, forbidden practices. For our present discussion, the importance of this section is in the use of the word "strike," rather than in the prohibited practices. Without a strike, there has been no violation of this section. In other words, if the union can accomplish any of the prohibited provisions of this section without inducing or encouraging the employees to engage in a strike, there has been no violation of the section. The contract which is at issue in the within case was voluntarily signed by the respondent carriers and the petitioning union, as indicated by all of the testimony in the case. There being no strike there was no violation of this particular section of the Act.

Section 8(b)(5) prohibits unions from requiring employees to pay excessive initiation fees. There has been no violation of this section claimed.

Section 8(b)(6) forbids the union to require featherbedding. There is no claim of violation of this section.

The foregoing has been a general discussion of every action which has been defined as an unfair labor practice on behalf of labor unions. Not one is in issue in the present case and it goes without saying that the Board would have no jurisdiction unless one had been at issue.

All of the unfair labor practices as defined by the Act affecting either the employer or the employee, are self-explanatory except, possibly, the requirement of Section 8(b)(4) that there be a strike to enforce the enumerated unlawful practices. The citation of a minimum amount of authority will explain this provision. This particular section was at issue in *Douds vs. Sheet Metal Workers Local Union No. 28*, 101 F. S. 970, and we quote from the report of the case in the Labor Services:

> "Inducement of one employer to cease doing business with, or to cease handling the goods of, another employer is not a violation of Section 8(b)(4)(A) of the amended Act on the part of the union where it is not accomplished by engaging in, or inducing, a strike or work stoppage against the first employer. The refusal of contractors to install equipment produced by a certain manufacturer is not induced by a strike or work stoppage of the contractors' employees where the refusal results from a voluntary agreement between the contractors' association and the union not to install equipment manufactured by any employer who does not employ members of the union, and where the only work stoppage which occurs takes place with the mutual consent of the union and the contractor who is involved, without any coercion on the part of the union. Where the union makes no attempt to force the manufacturer to employ its members, its action in such circumstances does not constitute an unfair labor practice under Section 8(b)-

(4)(A) against which injunctive relief is authorized by Section 10(1) of the amended Act."

and from the opinion:

"* * * Whatever objections can be taken to such agreement as being contrary to law, it cannot be regarded as a violation of Section 8(b)(4)(A), because the evidence fails to show that the respondent, in achieving its objective, induced or encouraged the employees of any employer to engage in an unfair labor practice as defined therein."

The proposition is demonstrated by a converse set of facts in *Aetna Freight Lines vs. Clayton,* decided by the United States Circuit Court of Appeals and reported at 228 F. 2 384. This case will be discussed in full in a later section of this brief. At this point we merely want to point out that one of the reasons an injunction issued by the Federal court was dismissed on appeal was that Section 8(b)(4) was involved and there was a strike in progress which made it an unfair labor practice, giving original jurisdiction to the Board, rather than to the Federal court.

We have heretofore in this brief discussed the jurisdictional question as it was raised in the *Colgate Palmolive-Peet* case, 282 Pac. 2 1015, page 10 *supra.* The decision in that case is germane to the present discussion as respects the point that since the question, as raised by the union, did not involve an unfair labor practice charge, it was proper to bring it in the State court of California. From the discussion of that case it will be recalled that had the union chosen to take advantage of the employer's unfair labor practice, it could have filed a complaint with the Board.

The National Labor Relations Board had found various unions guilty of unfair practices in their efforts to require an employer to discriminate against non-union

labor. In *Denver Building and Construction Trades Council vs. Henry Shore*, 287 Pac. 2 267 (Colo.), the employer sued the unions for damages by reason of the unfair practices previously litigated before the Labor Board. These same unfair practices had been proscribed in the collective bargaining contract, so that the same action which had been held contrary to law was also contrary to the terms of the bargaining agreement. The State court held that since the plaintiff was seeking the remedy through an action for breach of contract, the State court had jurisdiction, even though the employer could have sought to further proceed under the National Labor Relations Board. In other words, the court found that there were two remedies, one under the Board and one under the State law, and that there was no conflict between the two.

Where no unfair labor practice is involved giving jurisdiction of a controversy to the Board, the states retain their right to control the situation. See *Isbrandtsen Co. vs. Schelero*, 118 F. S. 579, wherein a petition for injunction was commenced in a State court, removed to the Federal court and remanded. The cited decision was by the Federal court remanding the case to the State court, and we quote from syllabus three:

> "Courts of state of New York may function in cases of injurious conduct in area comprehending labor relations which National Labor Relations Board is without express power to prevent and which therefore either is governable by state or is entirely ungoverned. Labor Managment Relations Act 1947, Para. 1 et seq., 29 U. S. C. A. Para. 141 et seq."

An injunction was granted by the Circuit Court of Hawaii in *Dairymen's Association vs. Hawaii Teamsters Local 996*, 25 LC* 68,307, where the picket line was in

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* LC refers to Commerce Clearing House Labor Law Reports, known as "Labor Cases."

violation of a no-strike clause contained in the contract in effect between the union and the employer. The court found that the action was essentially one to prevent a breach of contract, which was not an unfair labor practice as defined by the Act and, hence, there was no conflict in the remedy provided by the Board and the local court.

An injunction was granted in *International Association of Machinists vs. Goff-McNair Motor Co.*, 264 S. W. 2 48, 25 LC 68,135, by the Supreme Court of Arkansas, February 1, 1954, and we quote a syllabus of the case:

> "Even though interstate commerce is affected, the NLRA does not deprive a state court of jurisdiction to enjoin picketing for a purpose which violates state law, provided that the picketing is not an unfair labor practice upon which the NLRB is empowered to act. Picketing to compel the adoption of a union-security agreement which violates state law is not an unfair labor practice upon which the NLRB is empowered to act. Accordingly, a state court may enjoin such picketing even though interstate commerce is affected."

In further answer to part 2 of the petitioners' reasons for granting the writ, respondent carriers point out that the only jurisdiction in the Board to determine the subject matter of bargaining arises in a complaint by either the employer or the union that the other party is refusing to bargain. So long as both the employer and the employee representative bargain—as here—and enter into a written contract, there is absolutely no jurisdiction in the Board to either make any finding relative to the subject matter of bargaining or to interpret the resultant contract. The Act gives jurisdiction only to the courts of the United States or to the courts of the several states having jurisdiction of the parties to enforce or interpret the agreement once the agreement is reduced to writing and signed. Ob-

viously, only such a court can determine whether the contract is lawful and enforcible. See *Allen Bradley vs. Local Union No. 3*, 325 U. S. 797; *Giboney vs. Empire Storage & Ice Co.*, 336 U. S. 490; *Commonwealth vs. McHugh*, 326 Mass. 249, 93 N. E. 2 751; *McHugh vs. United States*, 230 Fed. 2 252, cert. den. 351 U. S. 966; *U. S. vs. Employing Plasterers Association*, 347 U. S. 186; *International Brotherhood of Electrical Workers vs. U. S.*, 219 Fed. 2 431; *Dickson vs. Northeast Texas Motor Freight Lines, Inc.*, 210 S. W. 2 660.

In specific reply to Section 4 of petitioners' reasons for granting the writ, respondent carriers point out that Article XXXII never became effective between the parties to the pending action. Its effectiveness was enjoined after it was negotiated, but before it was executed or effected. With the Court's approval all of the remainder of the contract, which covers working conditions of employees, was signed, became effective and is now in full force and effect; so that the action of the state court has had absolutely no effect whatsoever on the right of this labor union to bargain for employees of either the respondent carriers or of any other carrier. The fact that the remainder of the carriers in Ohio and the other locals of the Teamsters Union in the State of Ohio have signed the agreement in full, including Article XXXII, cannot control its legality; nor is the fact that these parties agreed voluntarily, or by reason of fear of reprisal, controlling as to its lawfulness. See *McHugh vs. U. S.*, 230 Fed. 2 252, cert. den. 351 U. S. 966; *Gulf Coast Shrimpers and Oysterman's Association vs. U. S.*, 236 Fed. 2 658; *Giboney vs. Empire Storage & Ice Co.*, 336 U. S. 490; *Allen Bradley vs. Local Union No. 3*, 325 U. S. 797.

The decision of the Ohio courts in this case has, likewise, no effect on the right of free speech (*Thornhill vs.*

Ala., 310 U. S. 88, cited by the petitioners), nor can it in any way affect, let alone interfere with, the right of the petitioners to bargain for employees of any motor carrier. The courts of Ohio found as a fact that no employees were affected—on the contrary, it found the Respondent Oliver to be an independent contractor and, as such, not covered by the National Labor Relations Act. Freedom of speech has never been an issue in this case in the Ohio courts—the petitioners and their affiliated unions representing all or nearly all of the employees within the multi-state area, as well as in the State of Ohio, and the employers engaged in business similar to that of respondent carriers have entered into the agreement.

The only question decided by the state courts below was that the union and carriers bargained on a subject prohibited by the Anti-Trust Laws of Ohio concerning a person and a subject matter over which they had no lawful authority to bargain.

It is respectfully submitted that not one issue has been raised by any party in the within action concerning a violation of the National Labor Relations Act and that therefore the NLRB would have no jurisdiction whatsoever to consider the matters presented to the court by the pleadings and evidence in this case and that therefore the State court has jurisdiction to determine the issue.

APPLICATION OF ANTI-TRUST STATUTES.

The proposition to be established in this section of the brief is the following: Whenever labor unions combine with a non-labor union organization in a manner which violates a State or Federal anti-trust law, they are as liable and guilty for such violation as any non-labor group.

It follows from the above-stated proposition that where such a violation occurs a labor union is subject to

all penalties provided in the Act. These penalties, generally, are liability for damages, penal liabilities, action for injunction by either the State or aggrieved private party. In the case of action for injunction in the Federal courts, the provisions of the Norris-LaGuardia Act prohibiting injunction against labor unions are not applicable, since the injunction sought is not concerned with a labor dispute. While we are presently concerned with an alleged violation of the State anti-trust laws by a combination between employers and a labor union group, the reasoning would be the same if the violation alleged were a violation of the Federal anti-trust law or that of any state. We will, therefore, cite authorities from various jurisdictions, including Federal.

One of the most recent and leading cases upon the illegality of combinations of labor unions and employers is that decided in the case of *Allen Bradley vs. Local Union No. 3*, 325 U. S. 797, 89 L. E. 1939. The evidence disclosed that there had been formed a combination of the manufacturers of electrical equipment in New York City, of the electrical contractors who installed the equipment and the local union which represented the employees of both the manufacturers and the contractors, which required that all electrical equipment installed in New York City must be manufactured locally, which combination resulted in higher profits for the employer group and higher wages for the employee group. The question presented was whether or not, considering the Sherman Anti-Trust Act, the Clayton Act and the Norris-LaGuardia Act, a labor union could be found guilty of violating the Sherman Anti-Trust Act and, if guilty, could an injunction be rendered against the union. The court found that the exemption accorded to labor unions and their members does not give them authority to combine *with other persons* (page 808).

The court further decided that the Norris-LaGuardia Act forbade injunctions against labor unions only when the unions combined with other labor groups and not when they combined with non-labor organizations. The Supreme Court, accordingly, upheld the trial court in granting the injunction and reversed the appellate court.

A later pronouncement by the same court on the same subject was made in *Giboney vs. Empire Storage & Ice Co.*, 336 U. S. 490, 93 L. E. 834. In this case a union was attempting to organize all ice peddlers in Kansas City, Missouri, "to obtain better wages and working conditions" by requiring all the manufacturers of ice to agree to sell their ice only to delivery men who belonged to the union. The Empire Storage & Ice Co. refused to sign such an agreement, although all of the other manufacturers of ice in the area signed the agreement demanded by the union. The union followed this refusal with a picket line to enforce its demands. An action was brought to enjoin the picketing under the Missouri anti-trust acts in State court. The State courts granted the injunction for the reason that the activity was an illegal combination and contrary to their anti-trust laws and the United States Supreme Court affirmed the decision. It is very interesting to note that in this case the delivery men owned their own trucks, purchased ice as independent business men and made their own deliveries from such trucks. It was the union's position in that case, as it is the union's position in the case now pending, that these trucks were merely the tools of a trade, such as a carpenter's hammer, and that it was necessary to control the price of ice from the manufacturer to the consumer in order to protect their wage and working conditions. This contention was, of course, made by the union in order to establish their position that a labor dispute existed and that the object of the picketing was a

lawful objective. In answer to this contention, the Supreme Court had the following to say, at page 496:

> "It is too late in the day to assert, against statutes which forbid combinations of competing companies, that a particular combination was induced by good intentions."

and, further, at page 497:

> "To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy and might conceivably make it impossible for them to enforce their antitrade restraint laws. See Allen Bradley Co. v. Local Union No. 3, I. B. E. W. 325 U. S. 797, 810, 89 L. ed. 1939, 1948, 65 S. Ct. 1533."

and at page 503:

> "* * * They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade * * *."

and at page 504:

> "While the State of Missouri is not a party in this case, it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way * * *. We hold that the state's power to govern in this field is paramount * * *."

A more recent decision by the same court is that of *U. S. vs. Employing Plasterers Association of Chicago, et al.*, 347 U. S. 186, 98 L. E. 618, where a criminal complaint was brought by the United States against a combi-

nation of plastering contractors and labor unions representing plasterers in Chicago area where the offense was the restrictions against out-of-state contractors or newly formed contractors from doing business in the Chicago area in competition with the older members of the Association. The complaint had been dismissed by the District Court and this decision was reversed by the Supreme Court, holding that the illegal combination did exist and that it could be restrained by the action of the United States government. In this particular situation the defendants had complained that only the State law was violated since all the activity was centered within the City of Chicago. Under headnote three, the Supreme Court answered this as follows:

> "Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases."

We feel that the converse would have been true had the complaint been filed by the State of Illinois since very often combinations in restraint of trade, as well as trade, very often has a local, as well as an interstate, effect.

A similar case was at issue in Local 175 of *International Brotherhood of Electrical Workers vs. United States*, 219 F. 2 431, wherein the local electrical contractors had agreed with the union that only one contractor, who would be designated by the group, would submit a low bid on the job and that others would bid pre-arranged, complementary higher bids; that any disagreement as to who should be the low bidder would be referred to a grievance committee; that the union would refuse to supply labor for any contractor who would not go along with the arrangement, with the result that the earnings of the contractors and union members were increased improperly. Such an arrangement was held to be

contrary to the Federal Anti-Trust Acts and an injunction was granted by the court. The court very specifically stated that the Clayton Act does not exempt a labor union from the scope of the Sherman Act when the union and its officials aid and abet non-labor groups in violating the Act.

A situation involving the Teamsters Union was at issue in *Dickson vs. Northeast Texas Motor Freight Lines, Inc.*, 210 S. W. 2, 660, 15 L. C. 64,743. In this particular case, a proviso in the Teamsters Union contract, which was signed by numerous employers, forbidding an employer to instruct his employees to go through a picket line or to handle "unfair" goods was held to violate a Texas statute prohibiting monopolies in conspiracy in restraint of trade, since it is a contractual means of effecting a secondary boycott. The interesting phase of this case as regards the case pending before this Court is that the motor carrier particularly involved in the action was an interstate carrier operating between Texas and Oklahoma pursuant to authority issued by the Interstate Commerce Commission. These facts were carefully pointed out in the court's opinion. The contract, having been entered into in Texas, was held to violate the Texas statute and was illegal, regardless of its interstate effect, since the result of the contractual term was an agreement between a union and a non-union organization to violate the State's anti-trust law.

Two decisions by the Supreme Court of Massachusetts are particularly interesting on the inter-play between Federal and State anti-trust laws. The first case cited does not affect a labor union, but the defense was very strenuously made that the Federal, rather than the State, anti-trust law had been violated. In *Commonwealth vs. Strauss*, 191 Mass. 545, 78 N. E. 136, an action was

brought by the state to enjoin the violation of a Massachusetts statute prohibiting the sale of goods where a condition of the sale is that the purchaser will not sell or deal in a competing article. The Continental Tobacco Co. controlled ninety-five percent of the sale of plug tobacco nationally and eighty percent of that sold locally. Its contracts with dealers prohibited the dealer to sell any competing item. The injunction granted by the trial court was affirmed as a proper exercise of the state's police power. The defense was made that since the contracts had been entered into with dealers nationally, as well as locally, and since the Continental Tobacco Co. was a national organization which controlled ninety-five percent of the sale of the particular type of tobacco, that any violation committed must be a Federal statute, rather than a state statute, since interstate commerce was involved. In answer to this argument, the court made the following statement:

> "This statute does not attempt directly to regulate interstate commerce, or to deal with it in any way. Indirectly it affects it in those cases where contracts are made for the sale and transportation of property in another state to a purchaser in this state. The statute does not purport to tax interstate commerce, or directly to impose any burden upon it. If it did, it would be unconstitutional. Robbins v. Shelby County Taxing District, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719."

and further, in reference to the Federal Anti-Trust Law, the court said:

> "That law deals only with contracts which directly affect interstate or foreign commerce by way of restraint of trade or the creation of a monopoly, and it does not touch contracts which affect interstate commerce only indirectly."

The second Massachusetts case is on all fours with the case now pending before this Court and on all points in issue. *Commonwealth vs. McHugh*, 326 Mass. 249, 93 N. E. 2 751, is an action by the State of Massachusetts under the state anti-trust law to enjoin a violation by the union representing fishermen and the employers of these fishermen. It seems the fishermen who operated out of Massachusetts received their pay by sharing the proceeds of the catch of fish with the owner of the boat on which they worked. In order to increase the percentage due the fishermen as wages, the union entered into contracts with the owners of the boats which gave the union the rigl to control the sale of fish. It should be noted that the fish were caught in international waters, transported into the State of Massachusetts and sold both locally and in interstate commerce, so that the question of interstate and foreign commerce was involved, as well as admiralty law. The union involved in the case claimed jurisdiction over fishing along the east coast from the State of Maine south to Virginia. The agreement limited the amount of fish which each man could catch, fixed the minimum price at which fish would be sold, required all fish to be sold through union-controlled selling sheds where all sales were at auction by union-employed auctioneers. Any boat owner who desired to sell his fish privately had to enter into competition in bidding for his own catch and any boat owner who refused to comply was refused the help of fishermen. Any fisherman who refused to comply with the union rules was refused employment. The union's first maneuver was to remove the case to Federal District Court, where it was promptly remanded to the State court in an opinion reported at 71 F. S. 516. The syllabi of the opinion remanding the case are of particular interest here and are therefore quoted:

"2. A suit is within federal jurisdiction as arising 'under the Constitution and laws of the United States' only when plaintiff's statement shows that his cause of action is based thereon, and it is not enough that defendant may find in them some ground of defense.

"3. Failure of plaintiff's statement of his cause of action to show that suit arises under constitution and laws of the United States, so as to give federal court jurisdiction, cannot be supplied by any statement in petition for removal.

"4. A bill of complaint by Commonwealth of Massachusetts setting out a cause of action under state anti-trust act was on its face a suit arising under state law, not under federal constitution or laws, and was not removable to federal court though purposes of state anti-trust act were similar to federal act, and though defendants attempted to show that interstate and foreign commerce and admiralty jurisdiction were involved."

When the case finally was returned to the State of Massachusetts for trial and following many preliminary proceedings to test the right of the state court to try the issues, an injunction was granted. The union asserted that the regulations at issue were necessary in order to "improve working conditions and to receive a fair share of the profits of our labor commensurate with the dangers and hardships of our occupation." The court answered the foregoing argument as follows:

"We cannot agree with the defendants' argument that they have done nothing more than engage in ordinary labor union activities for the purpose of improving their economic condition. *Doubtless their ultimate purpose was to improve their economic condition, but that is the purpose of all persons who engage in monopolistic enterprises.* The defendants' method of first bringing into their combination practically all the

fishermen and then using the control over the supply of one of the necessaries of life which this gave them directly and intentionally to reduce the supply and to raise the price is hardly the conventional pattern of labor union activity." (Emphasis ours.)

The defendants also contended that the State courts had no jurisdiction of the controversy since interstate and foreign commerce were involved. In answer to this claim, the court made the following statement:

"We assume without discussion that the operations of the defendants as fishermen occur to a considerable degree in the stream of interstate or foreign commerce both because of the sale and transportation of a substantial portion of the product to other States after it is landed, and because the product comes from the high seas (The Abby Dodge, 223 U. S. 166, 32 S. Ct. 310, 56 L. Ed. 390), and we further assume that the restraints imposed by the defendants affected that commerce in addition to their effect upon intrastate commerce. But we are not yet convinced that the State anti-monopoly law has been entirely superseded except in that narrow class of cases in which a monopolistic practice has little or no effect upon interstate commerce. To the best of our knowledge most of the States have constitutional provisions or statutes on this subject, many of them adopted subsequently to the Sherman Act. These enactments are outgrowths of long established common law doctrines and were designed to extend and adapt those doctrines to the needs of the time and locality as seen by the local law making bodies. These needs still exist, notwithstanding the Sherman Act. Monopolies and restraints of trade are of infinite form and variety. They range in extent and importance from that which is inconsequential to that which is of the utmost consequence. Some expend their effects almost wholly upon interstate commerce and are of only local interest and some almost wholly upon interstate com-

merce and so become matters of national concern, and there are all gradations between. In many cases it would be very difficult to draw the line. If State laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens without, so far as we can perceive, any corresponding contribution to the national welfare. See Duckworth v. State of Arkansas, 314 U. S. 390, 394, 62 S. Ct. 311, 86 L. Ed. 294, 138 A. L. R. 1144. Especially is this true in view of the immense broadening in the conception of interstate commerce in recent years. In general, the purposes of the State and the Federal laws are the same. Certainly that is true of our statute, and the Sherman Act. If there should be conflict between the State law and the Federal law, the Federal law would of course prevail whenever interstate commerce was involved. A state court should be thoroughly convinced before it abandons jurisdiction over subjects that historically have been within the competence of the State, lest it discover later that it has retreated where the Federal government will not advance and has therefore been derelict in its duty. * * * It is enough for the present that there are cases which give us reason to think that the Federal and State laws may operate together, even if in some aspects a monopoly which violates State law also tends to restrain interstate commerce. * * *"

The defendants next raised the point that the State court has no jurisdiction since a labor dispute involving interstate commerce was at issue within the contemplation of the National Labor Relations Act and that, therefore, jurisdiction was solely with the National Labor Relations Board. This defense was discussed by the court at page 764. The court very properly noted that there was no controversy concerning terms or conditions of employ-

ment as such, even though the result of the improper action might be to increase the earnings of the fishermen. The contention that the State lacked jurisdiction since the controversy came under the Federal admiralty statutes was rejected for the reason that all of the activity with which the case was concerned occurred within the State and upon the land of Massachusetts. We commend the court to a reading of this particular case since, although we have attempted to quote extensively from the court's opinion, there is much contained therein which would be of interest to any court considering the present issue.

A companion case to the foregoing is *McHugh vs. U. S.*, 230 Fed. 2 252, cert. den. 351 U. S. 966. The union and five business agents who were involved in the state court case were charged with a criminal conspiracy to violate the Federal anti-trust laws and were found guilty as charged. A defense that there could be no conspiracy since the employer group had not willingly acceded to the union's demands, but rather had been bullied into the agreement, was not accepted by the court.

See also *Gulf Coast Shrimpers and Oysterman's Assn. vs. United States,* 236 F. 2 658, 31 LC 70,209, decided September 6, 1956, cert. den. December 3, 1956, 352 U. S. 927, rehearing den. 352 U. S. 1019. This case was a prosecution of the fishermen's association and its officers by the United States for engaging in a conspiracy in restraint of trade or commerce under the Sherman Antitrust Act to fix the price of fish, principally shrimp caught in Mississippi ports. The evidence disclosed that practically all commercial shrimp and oyster fishermen operating from Mississippi ports were members of the association and this included both captains, as well as workmen. The boats were in some cases owned by the captain and in other

cases were owned by the packers who ultimately purchased the catch. Regardless of who owned the boat, the catch was required to be sold to certain designated packers by the association and the proceeds were split between the crew, the captain and the owner of the boat on a prescribed formula. The association fixed the price at which the catch must be sold and at which it must be purchased, and prohibited the packers to purchase from any boat save those members of the association. The evidence disclosed that the packers were invited to meetings at which the association fixed the price of the catch, but that they had little, if any, voice in the result of the meeting. In some cases the packers withheld income tax, social security and unemployment contributions from the fishermen's share of the catch. The court found that the indictment was good whether the association was a labor organization or not, since a labor organization has no Sherman Act immunity where they conspire to fix prices with a non-labor group. It also made no difference whether the conspiracy was forced on the non-labor group or whether it was acquiesced in.

In the *United States vs. Fish Smokers Trade Councils*, 30 LC 70,130 and 31 LC 71,291, the Federal District Court ruled that a union could be charged under the Sherman Act of conspiring to fix prices with a non-labor group, even though the same identical matters might also be an unfair labor practice under the National Labor Relations Act.

In view of the foregoing citations of authority, can there be any argument made against the proposition that unions are subject to all of the provisions of the State and Federal anti-trust laws when they combine with non-labor groups in the formation of trusts or monopolies as prohibited in the various Acts?

STATE COURT JURISDICTION IN ANTI-TRUST CASES.

The proposition to be discussed in this section of the brief has been very generally answered by the cases cited in the foregoing section. We here wish to emphasize that the Court of Common Pleas of Summit County does have jurisdiction to prohibit by injunction the provisions of a contract entered into in Ohio which violates the State Anti-Trust Act.

We have at issue in this case a contract entered into within the State of Ohio by unions domiciled in the State of Ohio with employers who maintain offices or are domiciled in the State of Ohio. The local unions who are parties to the contracts are local autonomous bodies domiciled solely within the State of Ohio. The portion of the contract which the plaintiff claims to be in violation of the Valentine Act is concerned with the terms and conditions of the lease of vehicles. These leases will be and are executed within the State of Ohio. The contract of lease will have a situs insofar as the law applicable to the interpretation of the lease within the State of Ohio. There is not one item in any lease presented to this Court, nor is there any evidence of any requirement of any lease, which will require the leased property to leave the State of Ohio. Obviously, it may do so, but that is not a condition of the lease. See the article on contracts, Volume 12, *American Jurisprudence*, paragraph 240, page 771:

> "* * * The laws which exist at the time and place of making a contract and at the place where it is to be performed, affecting its validity, construction, discharge and enforcement, enter into and form a part of it as if they were expressly referred to or incorporated within its terms."

We refer the Court to the cases cited in the prior section of this brief, but particularly to the cases of *Common-*

wealth vs. McHugh, Dickson vs. Northeast Texas Motor Freight Lines, Inc., State vs. Buckeye Pipe Line Co. and *Commonwealth vs. Strauss.* See also *Grenada Lumber Co. vs. State of Mississippi*, 217 U. S. 433, 54 L. E. 826, wherein it was held that the State's prohibition of a monopolistic agreement between a great number of retail lumber dealers within the State of Mississippi, in which they agreed to purchase no lumber from any wholesaler or manufacturer who sold direct to a consumer, was not contrary to any Federal statute or the Federal Constitution and was a proper decision of the State court where it violated a State anti-trust statute.

For a more recent case on this subject see *Alpha Beta Food Markets, Inc. vs. Amalgamated Meat Cutters and Butcher Workmen of North America*, decided December 31, 1956, in the California District Court of Appeals and reported at 305 P. 2 163, 31 L. C. 70,448. The plaintiffs, as one of a group of supermarkets contracting with the defendant on behalf of their butchers, agreed to the insertion of the following clause in their labor contract:

> "Self-Service Markets: All fresh meats, fresh poultry, fresh fish, fresh rabbits, shall be cut, prepared and packaged on the premises and dispensed by members of Meat Cutters Local."

Thereafter, as the development of the meat business into prepackaged frozen cuts grew into such a large proportion of the meat business, this particular party to the contract brought this action for a declaratory judgment under the California Anti-Trust Act to declare the aforementioned clause to be contrary to that statute, which the court so declared in the case. The court held that unions cannot combine with employers by means of bargaining contracts to prevent the sale of frozen prepackaged meats,

even though the objective of the union may be to monopolize the work on such meat products for their own members. Such provisions and bargaining contracts are illegal and void as being in violation of the Federal and State anti-trust laws. The court further held that neither the NLRB jurisdiction over unfair labor practices nor the Federal court's jurisdiction to enforce Federal anti-trust laws deprived a state court of jurisdiction to determine the legality under State anti-trust laws of such a contract, particularly where the pleadings did not indicate that any unfair labor practice was involved as defined by the National Labor Relations Act. This is a well reasoned case and well annotated.

INDEPENDENT CONTRACTOR.

The evidence in this case discloses that the plaintiff leases his equipment to the defendant carriers pursuant to an arrangement which requires him to furnish the truck, to maintain it in a good state of repair, to furnish all of the expenses of the operation of the truck and to furnish a driver, for which he is compensated on either a percentage of the revenue derived from the transportation of freight or on a tonnage basis. The plaintiff hires and discharges his drivers, withholds income tax, pays social security, workman's compensation and unemployment compensation for his drivers. The contract of lease provides that the relationship is that of independent contractor and not that of master and servant.

The control which the employer maintains over the plaintiff is that which is necessary to supervise the result which is sought, which is the prompt transportation of freight between terminals, and that which is necessary to require the plaintiff to comply with all of the rules and regulations of the Interstate Commerce Commission and

of the Public Utilities Commission, which have jurisdiction over the transportation of freight by the employer.

This section of the brief is concerned with the claim made by the union that Revel Oliver is an employee and that the motor equipment owned and leased by him is a tool of his trade, such as a carpenter's hammer.

The difference between employees and independent contractors was recognized by the National Labor Relations Board prior to the passage of the Taft-Hartley Act, but since the Board's duties were to protect the rights of the working man, it tended to declare the relationship that of employer and employee in close cases, or cases of any doubt.

The Congress of the United States apparently did not agree with this interpretation and in the passage of the Taft-Hartley Act specifically included an exemption of independent contractors from the definition of "employee," in Section 2(3) (Section 152(3) U. S. C. A.).

In the first case considered by it following the passage of this particular section, the Board had this to say on this point, *Kansas City Star Co.* (1948), 76 NLRB 384 (I CCH La. Serv., para. 1680.06):

> "The amended Act, as already noted, specifically excludes 'independent contractors' from the category of 'employees.' The legislative history, in this connection, shows that Congress intended that the Board recognize as 'employees' those who 'work for wages or salaries under direct supervision,' and as 'independent contractors' those who 'undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials and labor and what they receive for the end result, that is, upon profit.'"

We again refer the Court to the report of the House of Representatives relative to the congressional understanding at the time of the exemption of independent contractors from coverage of the LMRA, page 13, *supra*.

As is always true in the application of rules of law to facts, the Court must first determine what the relationship of the parties is before the law can be applied. In this particular case, the common law definition of "independent contractor" is applied in cases before the NLRB, but in many of the cases arising under State law, this rule varies by reason of peculiar local laws. If we make due allowance for the variations in local laws, we can draw a simple test which the Courts and Board seem to apply where they have the problem of determining whether a person is an "employee" or an "independent contractor" in the field of laws benefiting employees. Generally speaking, if the tribunal is satisfied that the true relationship has been presented to the court and that, applying common law principles, the employment arrangement is that of "independent contractor," there has been no hesitancy in so declaring the relationship. On the other hand, where the tribunal feels that the apparent appearance of such a relationship is actually a subterfuge in order to avoid the benefits of some substantive law, the tribunal has been equally free in declaring the relationship to be that of employer and employee.

The Supreme Court held in *Stout vs. Lye*, 103 U. S. 66, 26 L. Ed. 428, that a court which has jurisdiction has a right to decide every question occurring in the cause, and in *Ward vs. Todd*, 103 U. S. 327, 26 L. Ed. 339, that once the jurisdiction of a court over both subject matter and parties has fully attached, jurisdiction continues until all issues, both of fact and of law, have been fully determined,

in other words, until complete relief is afforded within the general scope of the subject matter of the action.

The Ohio courts have jurisdiction to interpret and enforce the Ohio Anti-Trust Act and have jurisdiction to make such factual decisions as are necessary in the application of that primary jurisdiction. *Allen Bradley vs. Local No. 3*, 325 U. S. 797; *Giboney vs. Empire Storage and Ice Co.*, 336 U. S. 490; *Commonwealth vs. McHugh*, 326 Mass. 249, 93 N. E. 2 751; *McHugh vs. U. S.*, 230 F. 2 252, cert. den. 351 U. S. 966; *U. S. vs. Womens Sportswear Mfg. Assoc.*; 336 U. S. 460.

In a pre-Taft-Hartley case, and under the doctrine of "free speech," independent contractors were permitted to picket and publicize their grievance in *Bakery and Pastry Drivers Local 802 vs. Wohl*, 315 U. S. 769, 86 L. E. 1178. The Supreme Court of the State of New York had held that the bakeries had a right to shift from a policy of employing driver-salesmen to employing owner-operator driver-salesmen having the status of independent contractor, where, taking a full view of the changed status, no subterfuge was involved anad their true relationship was that of independent contractor. The state court had ruled that since they were independent businessmen, there was no labor dispute and enjoined the picketing. The Supreme Court of the United States reversed solely under their then "free speech" doctrine and, of course, they were not hampered by the Taft-Hartley provision, which declares "independent contractors" not to be "employees" under the terms of the Act.

Owner-operators, similar to those involved in the pending case, were the subject of discussion in the case of *U. S. vs. Mutual Trucking Co.*, 141 F. (2) 655. This is a pre-Taft-Hartley case involving the social security tax.

The discussion in the case indicates that the owner-operators operated under an agreement similar to that under which the named plaintiff in the instant case operates. The relationship was determined to be that of independent contractor, upon whose earnings no social security tax was payable. The case arose in Ohio, Ohio law was applied and Ohio cases cited. The court particularly noted that this arrangement had been in effect since 1932, so that "no question of tax evasion is involved." (See page 657.) On the question of relationship of employee or independent contractor, under the applicable Interstate Commerce Commission Regulations, the court stated at page 658:

> "The Interstate Commerce Commission recognizes operation of trucking companies through independent contract, and its auditing department reports this class of business under the heading 'Purchased Transportation.' Since the Motor Carrier Act, now part II of the Interstate Commerce Act, Title 49 USC sec. 301 et seq., 49 USCA sec. 301 et seq., covers 'all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied' Title 49, USC sec. 303 (19), 49 USCA sec. 303 (19), the present operation, so far from being condemned, is valid under federal law. The use of the plates and the form of the application therefor is clearly explained by the necessity for complying with the regulations of the Interstate Commerce Commission."

The question of application of Social Security tax as applied to independent contractors was at issue in *Harrison vs. Greyvan Lines, Inc.*, 331 U. S. 704, 91 L. E. 1757. The court was concerned with two cases, one of which was concerned with the delivery of coal and the other the delivery of household goods over a system of nationwide rights issued by the Interstate Commerce Commis-

sion. The latter case is similar to that involved in the instant case and concerns the lessors of large tractors and trailers suitable for transportation of household goods. This case arose prior to the enactment of the Taft-Hartley Act. The case arose under the atmosphere in which the courts tended to construe the relationship of that of master and servant in order to grant as much coverage as possible for the Social Security Act, in order to effectuate the social purposes of the Act. Nevertheless, the court did determine that the relationship was that of independent contractor and the Act was not applicable.

This court approved its prior decision in *NRLB vs. Hearst Publications,* 322 U. S. 111, 88 L. E. 1170, wherein the court rejected technical tests of independent contractors in order to broaden the coverage of the various statutes passed for the benefit of employees. (Incidentally, it was this *Hearst Publication* decision more than any other which caused Congress specifically to exempt independent contractors from the coverage of the NLRA.) In spite of the court's approval of the *Hearst* case, it nevertheless held the lessors of moving equipment to be independent contractors, and we quote the following:

> "There are cases too where driver-owners of trucks or wagons have been held employees in accident suits at tort or under workmen's compensation laws. But we agree with the decisions below in Silk and Greyvan that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors.
>
> "These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control

exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

The court again noted, and we wish to emphasize this point, that the leases had been in effect upon similar terms since 1930 and that no subterfuge was involved.

A decision involving owner-operators similar to Revel Oliver is involved in *Rabouin vs. NLRB*, 195 F. (2) 906. In this case the Teamsters' union struck Rabouin to require him to hire union drivers on his equipment which he leased to Mid-Atlantic Transportation Company with drivers. Employer claimed this was a secondary boycott. The court held that since, under the terms of his lease, to Mid-Atlantic Transportation Company, Rabouin was an independent contractor and the principal employer of the drivers involved, there was no secondary boycott and the picketing was against the proper employer. Since the strike was involved solely with the question of the union affiliation of the drivers and was not concerned with the terms of the lease to the transportation company, no violation of law was involved.

The following decisions have all been decided by the National Labor Relations Board and in each case the determination was made that the relationship was that of employer and independent contractor.

NeHi Bottling Co., Inc., 101 NLRB 68. Twelve driver-salesmen who furnish their own trucks, hire their own helpers, select their own substitutes when they are not able to drive, who receive the difference between the cost and sale price of the beverage as remuneration, who pay their own expenses, are not carried on the employer's payroll and are not reported for employees' taxes, were independent contractors and, as such, were not included in a unit of employer.

A similar question was at issue in *American Factors Co.*, 98 NLRB 447. In this case the employer was gradually changing the relationship from employee to independent contractor. Each driver bought, or is purchasing or preparing to purchase, his own truck. He pays cash for the company's products, which he delivers and sells within an assigned territory. There is no supervision other than that he is required to sell a satisfactory amount of goods. He picks his own hours of work and pays his own operating expenses. Such persons were not included in a unit for bargaining purposes.

Malone Freight Lines, Inc., 107 NLRB 507: Owner-operators similar to Revel Oliver were held to be independent contractors. The Board cited and based its decision by comparing this contract with that presented to the court in the *Greyvan Lines* case and *Oklahoma Trailer Convoy, Inc.*, 99 NLRB 1019, and distinguished the *Nu-Car Carriers* case, 189 F. (2) 756. The Board particularly stressed the fact that the owner-operators had title to their trucks before they came to work for Malone. The Board also considered it significant that the owner-operators paid their own State license fees and taxes, hired and paid their own helpers, selected and paid their own repairmen. The owners did not get vacations and other employee benefits.

Similarly, see *Eldon Miller, Inc.*, 107 NLRB 557.

In *Oklahoma Trailer Convey, Inc.*, 99 NLRB 1019 (a representative case where the employee relationship was very similar to those in the present case), the lessors of trucks and their drivers were held not to be employees of the carrier. The lessors were held to be independent contractors and their drivers were their employees. We quote the Board at page 1023:

"We note particularly the bona fide and absolute ownership of the trucks by the owners * * * also significant in demonstrating the true entrepreneurial nature of the owners if the fact that the *owners* determine whether to drive the trucks themselves or to employ others to do so."

The Board further noted that all of the reserved control is essential to the end to be accomplished and the observance of the rules of the Interstate Commerce Commission. See also *Sinclair Refining Co.*, 93 NLRB 1115; *Nelson-Ricks Creamery Co.*, 89 NLRB 204; *Spickelmier Co.*, 83 NLRB 452; *Jalmer Berg*, 35 NLRB 357; *Consolidated Forwarding Co., Inc.*, 117 NLRB 53, CCH LS 52,909.

In *Alaska Salmon Industries, Inc.*, 110 NLRB 145, it is interesting to note that the Board held that the operators of the company boats, as well as leased boats, were independent contractors rather than employees, where they all operated under similar contracts, hired their own crews, determined the split of the catch among their crew members, selected their own fishing spots, etc. See also *Cement Transport, Inc.*, 111 NLRB 23, LS 52,616.

An interesting case from the point of view of the case now pending is *Hoster Supply Co.*, 109 NLRB 74, in that the Labor Board, after full consideration of the facts, determined that the individual had a dual capacity. He was an independent contractor as the lessor of his tractor and trailer to the employer, and an employee in his relationship as driver of the leased equipment. The facts disclosed that the employer leased the trucks and agreed to pay so much per mile for the use of the trucks and, additionally, to hire drivers and pay them a prevailing wage. In the practical operation of the arrangement, the lessee hired the lessor as the driver, but under the arrangement he could have hired any driver.

The most recent case in the particular field being briefed is that of *Arnold Bakers, Inc. vs. Strauss*, decided by the New York Supreme Court, Appellate Division, on June 4, 1956, and reported in 30 LC 70,048. At issue were driver-salesmen of bakery products. The union sought to organize these driver-salesmen and, in order to make their picketing effective, carried it out at the site of the deliveries, which were retail stores. The New York Supreme Court granted an injunction against this picketing. The union claimed that the contracts of the driver-salesmen was a device to cloak the true status of these persons. While all of the ultimate facts were not disclosed in the report of the case, the trial court found them to be independent contractors. The court further discussed the question of the jurisdiction of the NLRB and found that its jurisdiction was confined to the employer and employee relationship and, therefore, not applicable where the relationship was that of employer and independent contractor.

The effect of the cases cited in this section of our brief is as follows:

1. The tribunal having jurisdiction of the parties and of the issues has jurisdiction to determine all of the issues necessary, including that of the relationship between the parties.

2. It was the intention of Congress, in exempting independent contractors from coverage by the LMRA, to apply local common law to determine the relationship.

3. The Ohio courts properly found that Respondent Oliver was an independent contractor.

INTERSTATE COMMERCE ACT.

The petitioners, in Section 3 of their reasons for granting the writ, contend that the Interstate Commerce Act exempts the relationship here involved from the anti-trust laws. The Interstate Commerce Act grants no general exemption from the provisions of the anti-trust laws to carriers regulated by the Interstate Commerce Commission.

Section 5(11) of Part 1 of the Interstate Commerce Act, Title 49 U. S. C. 5(11), specifically exempts carriers from the anti-trust laws, both federal and state, in the case of mergers, unification, consolidation and control, where such has been specifically approved by the Interstate Commerce Commission.

Section 5b(9) of the Interstate Commerce Act, Title 49 U. S. C. Section 5b(9), exempts agreements entered into between carriers, which agreements have been entered into pursuant to Section 5b(2), when the agreement has been "approved by the Commission."

Section 5b(2) pertains to agreements between carriers "relating to rates, fares, classifications, divisions, allowances or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment) or rules and regulations pertaining thereto."

These are the only references to anti-trust exemption contained in the Interstate Commerce Act, as amended. By no stretch of the language of the Act can these include agreements for the lease of motor freight equipment.

It is obvious from reading the Supreme Court's opinion in *American Trucking Assn. vs. U. S.*, 344 U. S. 298, that the rules promulgated in MC-43 and approved by the Supreme Court authorized the use of independent con-

tractors by regulated motor carriers, such as respondent carriers. See the court's opinion, page 304:

> "Since the driver of the exempt equipment is not an employee of the carrier * * *."

At page 307, the court, in commenting upon Rule 207.4-(a)(4), noted that the lease must exceed thirty days "when the driver is the owner or *his employee.*"

The present effective rule of the Interstate Commerce Commission relative to the leasing of vehicles is reproduced at 21 Fed. Reg. 9653 (and at Paragraph 3381, Commerce Clearing House Federal Carrier Service) and applies only to the lease of equipment with drivers and exempts from the rule the lease of equipment without drivers. See Rule 207.3(d).

There is thus no rule of the Interstate Commerce Commission prohibiting the acquisition of equipment by the employment of independent contractors. On the contrary, it is this practice which is regulated and thus allowed by the rules which were at issue in the *American Trucking Association* case.

Respondent carriers submit that the Interstate Commerce Act can afford no relief to the petitioners in this case.

CONCLUSION.

The finding and judgment of the Supreme Court of Ohio and the Court of Appeals for the Ninth District of Ohio are fully supported by the evidence and the law and all issues have been decided by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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